

will follow suit around the world -- thus compromising the investment requirement for these new and innovative services, and increasing exponentially the risk of economic inviability. As Chairman Quello wrote this past summer to various members of Congress, "requiring use of competitive bidding for low Earth orbiting satellite system licenses in this country might subject those licensees to exorbitant payment requirements for access to spectrum in other countries." Letter from James H. Quello, Chairman, FCC, to various members of Congress, dated June 23, 1993.

Competitive bidding would thus result in substantially increased costs for all system operators, where foreign competitors do not face such up front obstacles. The burden on U.S. operators would inevitably lead to higher consumer charges that could jeopardize the economic viability of some or even all service applications. Indeed, it could make the MSS/RDSS proposition so risky as to deter potential entrants, resulting in a non-competitive market, or worse, no market at all. In short, the disadvantages and dangers of adoption of the competitive bidding procedures for the MSS/RDSS substantially outweigh any possible benefits.

**III. Lotteries Are Also Inappropriate As A Means Of Assigning MSS/RDSS Licenses.**

In its brief statement concerning auctions for the MSS/RDSS service, the Commission also states that, because "a

significant number" of the applications were accepted for filing prior to July 26, 1993, OBRA permits the Commission to consider lotteries as a potential assignment mechanism for this spectrum. NPRM, FCC 93-455, slip op. at ¶ 155. However, despite the provisions of OBRA, the statutory provision establishing the Commission's authority to use lotteries would not permit a lottery in this instance.

Specifically, as set forth in greater detail in the Memorandum of Points and Authorities attached hereto, in every prior instance where authorizations have been assigned by lottery, the Commission has first established, using criteria set forth by Congress, that the service to be provided is one for which a lottery is appropriate under the statute, and then has formulated a selection procedure. The Commission, however, has never made a determination that random selection is an appropriate means of selecting satellite licensees.

Indeed, adoption of lotteries for selection of MSS/RDSS licensees would be wholly inconsistent with the legislative purposes of the statute permitting assignment by lottery, and with the Commission's prior decisions authorizing use of random selection procedures. In particular, Congress made clear that lotteries were intended for services where a large number of licenses were available, and service could be implemented more quickly by using random selection to ameliorate a back log of mutually exclusive applications. See Attachment at 2-3. The Commission has consistently adhered to these criteria and has

never authorized lotteries for a service that is inconsistent with this model.

The MSS/RDSS possesses none of the characteristics considered relevant by Congress -- there are only a few potential licenses and applicants in but a single processing group. In fact, in the domestic MSS proceeding, the Commission explicitly rejected lotteries as a means of selecting a licensee before authorizing the AMSC consortium. But see Attachment at 5-8. Lotteries thus are not an alternative the Commission may use to assign spectrum to MSS/RDSS licenses.

#### **IV. Other Matters Pertaining To Auctions Generally.**

In addition to demonstrating the fundamental unsuitability of the MSS/RDSS service for application of competitive bidding or random selection procedures for spectrum assignment, there are a number of other discrete issues raised in the NPRM upon which TRW wishes to comment. These issues are addressed in turn below.

##### **A. The Judgment Of Congress And The Commission That Auctions Should Apply Only To Initial Licensing Is Not Only Sound, It Is Essential.**

The threshold criterion that auctions apply only for initial applications is an essential limitation on this procedure. OBRA, 1993 U.S.C.C.A.N. at (107 Stat.) 388 (to be codified at 47 U.S.C. § 309(j)(1)). Using competitive bidding at renewal would require existing service providers to pay simply

for the privilege of continuing in business. The effect would be virtually extortionate and could easily lead to abuses of the process, perhaps more insidious than those that auctions were designed to avoid. It is very likely that use of competitive bidding in the renewal context would also prove counterproductive to the revenue generating potential of initial licensing. Faced with the likelihood of having to bid again to retain a license, potential bidders faced would likely adjust their calculations of the value of the license dramatically downward.

**B. Any Competitive Bidding Procedure Adopted For The MSS/RDSS Service Cannot Provide For Auctioning Of Feeder Link Spectrum.**

Regardless of what action the Commission might take with respect to competitive bidding for the MSS/RDSS band segment at 1613.8-1626.5 MHz, under no circumstances should feeder link spectrum, which is generally non-adjacent to service uplink and downlink bands, be subject to separate bidding.<sup>16/</sup> Rather, any right to operate an MSS/RDSS system in primary uplink and downlink frequencies should carry with it the authority to use a

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<sup>16/</sup> In the MSS/RDSS proceeding, not all applicants have proposed specific feeder link bands, and currently none of the uses proposed by any applicant is mutually exclusive with another's proposal. TRW, for example, has proposed feeder link frequencies in the Ka-Band (at 19.7-20.2 GHz and 29.5-30.0 GHz). Motorola has stated that it will require approximately 200 MHz for feeder links at different frequencies within the Ka-Band. Other applicants have proposed establishing feeder links in the 5150-5250 MHz and 6484-6591 MHz bands.

sufficient amount of additional spectrum for required feeder links.

The regulatory scheme established in the OBRA precludes the Commission from subjecting the MSS/RDSS applicants' proposed feeder link assignments to competitive bidding procedures. As of now, the proposed feeder link assignments of the six MSS/RDSS applicants are not mutually exclusive. Without mutual exclusivity among applicants for the same service, competitive bidding procedures cannot be employed.<sup>17/</sup>

TRW notes, moreover, that the congressional scheme is limited to intraservice competitive bidding -- i.e., among applicants for initial licenses in the same radio service. At no point does the Commission or Congress indicate that interservice bidding would be employed (e.g., bidding between MSS and fixed service applicants). Indeed, the OBRA specifically contemplates that spectrum allocation decisions will be made as they presently are (47 U.S.C. § 309(j)(6)(A)), and it is in allocation decisions where the Commission determines the ability of two or more services to share a frequency band (and on what conditions, etc.). The spectrum allocation process itself has been left unchanged by OBRA.

As a result, if the Commission allocates spectrum for or assigns spectrum to MSS/RDSS feeder links, and no mutually exclusive applications are filed for such allotments or

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<sup>17/</sup> See Section II.A, supra.

assignments by those proposing MSS/RDSS service, competitive bidding is neither necessary nor appropriate. Thus, MSS/RDSS applicants may not be forced to bid for feeder link spectrum against entities proposing alternate, non-MSS uses of the spectrum.<sup>18/</sup>

**C. In New Services Where Competitive Bidding Procedures Are Imposed, The Commission Should Adopt Payment Methods That Account For The Novelty Of The Technology, The Risks Associated With Its Implementation, And Other Service-Specific Factors.**

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As the Commission notes in the NPRM, in those instances where auctions are used, it will be important "to limit bidding to serious qualified bidders." NPRM, FCC 93-455, slip op. at ¶ 102. In order to accomplish this goal, the Commission proposed to require each auction participant either to exhibit or to tender in advance an "upfront payment." Id. The Commission also proposed to require auction winners to tender immediately a significant, non-refundable sum to the Commission, consisting of the upfront payment (if not tendered prior to the auction), and perhaps an additional amount to constitute a deposit (e.g., to bring the amount of money submitted to the Commission up to a specified percentage of the bid). See NPRM, FCC 93-455, slip op. at ¶ 104. Among other things, the upfront payment and deposit would operate as a financial qualification for those services

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<sup>18/</sup> Although bidding will not occur on MSS/RDSS feeder links, TRW observes that any proposal to award such bands by competitive bidding would be subject to all of the myriad concerns and problems addressed in Section II above.

where no financial qualifications are explicitly set forth. (See NPRM, FCC 93-455, slip op. at ¶ 102.<sup>19/</sup>

Although the Commission is correct that it is advisable to have some assurance of each applicant's financial qualification at the outset of any auction, this threshold requirement must be more flexible when the Commission is licensing services that are innovative and/or highly risky. To facilitate the introduction of such services, the amount of the upfront payment and deposit required by the Commission for a particular service should be inversely proportional to the degree of risk and novelty of the technology or its commercial application.

For some services, where the technology is tested and the likelihood of short-term profitability is high, gaining access to spectrum may be the most significant start up expense. In such cases, significant capital is likely to be in place initially, so that the Commission may be justified in seeking more significant initial payments. Applicants to provide new or innovative services, however, will face a broader range of initial expenses, from pre-application research and development,

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<sup>19/</sup> TRW notes that the decision whether to have an explicit financial qualification standard and what it might be is one of the essential prerequisites to conducting an auction. Contrary to the implication in the NPRM, the Commission may not require auction applicants to certify that they meet financial qualifications that the Commission "might adopt for the service in question." NPRM, FCC 93-455, slip op. at ¶ 98. As discussed in Section II, supra, such fundamental service rules determinations are prerequisite to using competitive bidding procedures.

perhaps including obtaining and implementing experimental authorizations, to insurance payments that are likely to be unusually high. Moreover, given the higher costs of providing these services, these applicants may need additional time to secure investors.

In light of these financial strains on such applicants, the Commission should adopt upfront payment policies for cutting-edge services that are lower in percentage terms than those for more conventional services and, even more importantly, provide greater flexibility in the timing of such payments.<sup>20/</sup>

Unreasonably restrictive "performance requirements" would only undermine Congress's directive "to promote investment in . . . new technologies and services." OBRA, 1993 U.S.C.C.A.N. at (107 Stat.) 389 (to be codified at § 47 U.S.C. § 309(j)(4)(B)).

In this regard, similarly, the Commission's proposed upfront payment formula of two cents per megahertz per pop (population) is likely to be wholly inappropriate for a new and untested technology. See NPRM, FCC 93-455, slip op. at ¶ 103 and n.98. This calculation is uniquely based on the economics of PCS, and its spectrum blocks covering local market areas. It is

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<sup>20/</sup> For example, a winning bidder to provide a risky service, should not be required to deposit twenty percent of the bid immediately, as suggested by the Commission (see NPRM, FCC 93-455, slip op. at ¶ 104), but should instead be given adequate time to arrange payment from financial backers. Similarly, the Commission should not discourage entrepreneurs from pursuing new, untested ventures by imposing a punitive forfeiture of an upfront payment if an initially successful bidder is unable to meet a deposit deadline. Cf. NPRM, FCC 93-455, slip op. at ¶ 109.



also fundamentally geared to a service using established terrestrial technology, an extension of existing and highly profitable cellular service. For example, if competitive bidding were an appropriate method for assigning MSS/RDSS spectrum, the numbers would quickly become absurd when applied to MSS/RDSS, which is inherently national (indeed, global) in scope.<sup>21/</sup>

Finally, one of the more complicated and difficult issues raised by the Commission in the NPRM is the question of alternative payment methods, particularly the potential use of installment payments and royalties. Although the Commission focuses on the potential use of royalties "as a possible solution to the entry cost problems of small bidders" (NPRM, FCC 93-455, slip op. at ¶ 70), it also notes that there may be advantages to accepting royalties "if the FCC is licensing a highly risky service." Id. Indeed, as suggested by the Commission, in addition to taking into account the size of businesses in bidding procedures, the Commission should take into account the riskiness of the service to be offered in designing not only initial

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<sup>21/</sup> To illustrate, an MSS applicant seeking ten megahertz of spectrum, which is the minimum portion of the contested L-band uplink allotment sought by any of the current group of applicants, would be forced to pay \$50,000,000.00 just to be permitted to bid for an authorization. (two cents per MHz per pop =  $\$.02 \times 10 \times 250,000,000$  (est. U.S. pop.) = \$50,000,000). By comparison, when the AMSC consortium was established -- an endeavor made substantially less risky than it might have been by its status as a monopoly domestic service provider -- each contributing member was required to put up only \$ 5 million, an amount which guaranteed equity participation in the venture.

bidding but also long-term payment methods. Those willing to risk substantial capital to provide beneficial services to the public should be encouraged to do so with flexible payment options, including the leveraging of possibly distant future revenue streams.

High risk ventures should be permitted greater flexibility in making initial upfront payments and, if successful in obtaining a license by auction, in meeting payment deadlines. This latitude should include the use of both letters of credit (as permitted when the AMSC consortium was established) and the ability to rely on royalty payments. While such methods may be difficult to apply, they are indispensable when commercially untested technology is involved. Without such methods, competitive bidding procedures would likely freeze out innovators.

**D. The Commission Must Not Unduly Restrict The Capability Of Applicants To Form Consortia Or Other Cooperative Groups For The Purpose Of Joint Bidding.**

In the NPRM, the Commission sought comment on its own initiative concerning the potential problem of collusion among auction participants. See NPRM, FCC 93-455, slip op. at ¶ 93. While the Commission's concern with possible collusive behavior in auction proceedings is understandable, this is an area where the Commission must take great care in order to avoid discouraging efficient cooperation among applicants seeking to provide the same types of service. As the Commission also noted

in the NPRM, "if the anticollusion rules are too tightly drawn, they could prevent the formation of efficiency enhancing bidding consortia that pool capital and expertise of small firms in order to compete against bigger firms." Id.

TRW believes that the Commission's concern about overly broad anticollusion rules is well-placed, but that it should not be limited to encouraging consortia among small businesses. To this end, the Commission should clearly direct its focus in this area to prohibit only conduct that is anti-competitive; it should not preclude or unreasonably constrain useful collaborative efforts. For example, in some instances it may be beneficial to allow potential competitors to combine in order to bid for blocks of spectrum, not simply because they can compete against a bigger company, but because the combining group will be able to share the spectrum and actually provide multiple competing services within it. It plainly would be counterproductive to restrict cooperation among such applicants, particularly when one important goal of the auction legislation is promoting economic opportunity and competition, and avoiding excessive concentration of licenses. See OBRA, 1993 U.S.C.C.A.N. at (107 Stat.) 388 (to be codified at 47 U.S.C. § 309(j)(3)(B)).<sup>22/</sup>

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<sup>22/</sup> Such an approach would be especially beneficial in instances where a potential rival bidder for the spectrum could be expected to use it to implement a monopoly service.

**E.    The Qualifications Of Auction Winners Should Be Reviewed Following Completion of Bidding, And Cut-Off Protection Of Other Bidders Should Continue Until A Winning Bidder's Qualifications Are Established.**

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The Commission also solicited comment on alternative timetables for entertaining petitions to deny, either at the time all initial, or short-form, applications are filed, or after the winning bidder has been identified. See NPRM, FCC 93-455, slip op. at ¶ 111. As implied by the Commission, there are obvious efficiencies to considering petitions to deny only after an auction has been completed. If such petitions are filed before that time, unsuccessful bidders may very well redouble their efforts to find flaws in the winning applicant, leading to the filing of numerous supplements to initial skeletal petitions to deny, accompanied by claims that the information submitted was previously unavailable. Rather than having to litigate such issues after accepting an initial round of petitions, the Commission should simply establish a thirty day window after the selection of an initial winning bidder within which other parties may file their petitions. This is the best way to avoid delays caused by litigation, and to conserve administrative resources.

In the event that a winning bidder is disqualified via this procedure, the other initial round bidders should retain their cut-off protection and a second round of bidding should be conducted. New applications should be accepted only if no

qualified applicant emerges.<sup>23/</sup> Proceeding in this fashion would enhance the likelihood of early implementation of service, as service would be delayed if the Commission were forced to start the process over again with solicitation of applicants each time a winning bidder was disqualified.

## V. Conclusion

In sum, as a revenue generator, auctions are understandably appealing; however, they cannot be successfully used in all services. Rather, the individual characteristics of each service must be carefully considered and analyzed under the conditions precedent and objectives set forth in the auction legislation. For all of the reasons articulated above, TRW urges the Commission to conclude that the broad-brush approach to auctions adopted in the NPRM, which appears to suggest that auctions can be implemented for all types of private and common carrier services based on a PCS-based model, simply is not

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<sup>23/</sup> For example, if three mutually exclusive applicants bid for the same spectrum and two of them are ultimately disqualified, each after being the high bidder in a round of bidding, the third applicant (assuming that it is ultimately found qualified) should be permitted to secure the license by tendering its final bid in the second round auction, rather than the Commission accepting a new group of applicants.

appropriate for the awarding of initial licenses to applicants in the new MSS/RDSS service.

Respectfully submitted,

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ATTACHMENT

## MEMORANDUM OF POINTS AND AUTHORITIES

Section 309(i) of the Communications Act provides the Commission with broad authority to choose licensees through random selection. The authority under Section 309(i), however, is not absolute. As shown herein, the language and legislative history of Section 309(i), and the Commission's prior application of its rulemaking powers to impose lotteries thereunder, demonstrate that it would be inappropriate to use random selection procedures to select licensees in the new Mobile Satellite Service/Radio Determination Satellite Service ("MSS/RDSS") from among a single group of six mutually exclusive applicants.

**I. The Commission Must Adhere To Strict Criteria In Implementing Random Selection Procedures Under Section 309(i).**

To date, the Commission has implemented random selection procedures for the licensing only of certain common carrier services, which are enumerated in Rule 1.821. See 47 C.F.R. § 1.821 (1992).<sup>1/</sup> The Commission has never implemented

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<sup>1/</sup> The recently enacted legislation mandating that the Commission adopt competitive bidding procedures will ultimately result in the modification of this rule. Henceforth, those private and common carrier services that involve licensee compensation from subscribers will be subject to auctions, not lotteries. See Omnibus Budget Reconciliation Act, Pub. L. No. 103-66, 1993 U.S.C.C.A.N. 312, 388 (to be codified at 47 U.S.C. § 309(j)(2)). Because the pending MSS/RDSS applications were on file before the adoption of auction legislation, however, the Commission theoretically may still consider use of lotteries for that service. See Implementation of Section 309(j) of the Communications Act, Competitive Bidding, FCC 93-455, slip op. at ¶ 155 (released October 12, 1993).



random selection procedures for satellite services (which are licensed under Part 25 of the Commission's rules). The consideration of any proposal to extend such procedures to satellite services would be governed by the statute and its legislative history, and by the Commission's prior actions adopting lotteries pursuant to Section 309(i).

Beginning with the adoption of lottery procedures for the Public Land Mobile Service in the original Lottery Order, and in all subsequent extensions of such procedures to new common carrier services, the Commission adhered strictly to the criteria set forth in the legislative history of the lottery statute to determine whether the use of random selection in a new service is in the public interest. In the Conference Report relating to the bill, Congress set forth the following criteria for the Commission's consideration in determining whether a lottery would serve the public interest:

[1] whether there is a large number of licenses available in the particular service under consideration; [2] whether there is a large number of mutually exclusive applications for each license, for example, when a new service is initiated; [3] whether there is a significant back-log of applications; [4] whether employing a lottery would significantly speed up the process of getting service to the public; and [5] whether selection of the licensee will significantly improve the level [of] diversity of information available in the community versus the use of the traditional comparative hearing process. The Commission, in making this public interest assessment when deciding whether to utilize a lottery in a particular instance, should consider all of these factors.

H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess., at 37 (1982), reprinted in 1982 U.S.C.C.A.N. 2237, 2281 ("Conference Report"). In every instance where the Commission has adopted lottery procedures for a service, its decision has been firmly based upon careful application of these criteria.<sup>2/</sup>

In the case of the current Commission proceedings relating to the MSS/RDSS, these criteria are not satisfied. First, depending upon the technical specifications ultimately adopted, there may be only a single license available in the allotted bands. At most, only a few licenses will be available. Second, there is a small group of six applicants vying for the license or licenses.<sup>3/</sup> Third, because this is the only group

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<sup>2/</sup> See Lottery Order, 93 F.C.C.2d at 953 and 992; Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 98 F.C.C.2d 175, 180-82 (1984) ("Cellular Lottery Order"); Amendment of Parts 1 and 21 of the Commission's Rules and Regulations in Regard to Using Random Selection Procedures to Select Permittees in the Multipoint Distribution Service, 57 R.R.2d 943, 945-46 (1985) ("MMDS Lottery Order"); Amendment of Parts 1 and 21 of the Commission's Rules to Establish Procedures for Processing Mutually Exclusive Applications for Digital Termination Systems in the Digital Electronic Message Service, 59 R.R.2d 151, 153-156 (1985) ("DEMS Lottery Order").

<sup>3/</sup> To illustrate the marked contrast with other services where lotteries were instituted, in the Cellular Lottery Order the Commission noted that "[i]n markets 31-60, we have an average of 11 mutually exclusive nonwireline applications per market. Only three markets have five or fewer nonwireline applications; most have 12 or more mutually exclusive applications." See 98 F.C.C.2d at 181. See also DEMS Lottery Order, 59 R.R.2d at 155 ("there are approximately 77 service areas in which there are some 301  
(continued...)

of applications eligible for processing at this time, there is no back-log in processing applications. The initial MSS/RDSS licenses will be for inherently national systems, and the Commission has the discretion to determine when and whether additional applications will be allowed. Finally, it is unlikely that choosing an applicant by random selection would speed service to the public because the applicant so chosen might not have the financial wherewithal or technical capability to move quickly to implement service. Indeed, random selection is likely to delay the implementation of MSS/RDSS service to the public, as non-prevailing applicants are likely to use every means at their disposal to challenge the basic qualifications of the lottery winner. See Section C, infra. Thus, none of the elements that Congress enumerated to make the requisite public interest finding are present in the MSS/RDSS context.

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<sup>3/</sup>(...continued)

situations involving 845 applications"); MMDS Lottery Order, 57 R.R.2d at 946 ("approximately 1,000 MMDS licenses are available . . . there is a backlog of about 16,000 pending MMDS applications.").

**II. The Commission Has Considered And Rejected The Use Of Random Selection Procedures In MSS Licensing.**

In 1987, the Commission considered the use of lotteries to select a domestic MSS licensee.<sup>4/</sup> At that time, the Commission concluded that random selection was inappropriate. The Commission then specifically questioned whether the statutory requirements for using lotteries could be met in the situation where twelve applications had been filed but only one license was to be awarded.<sup>5/</sup> The Commission also suggested that the use of a lottery could actually result in a delay in the implementation of service:

The determination of qualifications [after selection of a tentative licensee] could significantly delay the award of a license and, consequently, service to the public. If the authorization were awarded to an unqualified entity, the entire process would need to be repeated. Thus, lotteries do not appear to be an acceptable processing alternative.

MSS Report and Order, 2 FCC Rcd at 487.

Upon remand of its decision to impose a mandatory consortium in the domestic MSS proceeding (and ultimately to license the American Mobile Satellite Corporation), the

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<sup>4/</sup> See Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services, 2 FCC Rcd 485 (1987) ("MSS Report and Order") (subsequent history omitted).

<sup>5/</sup> Id. at 487.

Commission revisited the issue of the propriety of lotteries in the MSS proceeding. In completing this judicially mandated task, the Commission was guided by the stern directive of the U.S. Court of Appeals for the District of Columbia Circuit that the Commission determine whether it has "the statutory authority to impose a consortium requirement in lieu of holding comparative hearings with respect to mutually exclusive applications. This would appear to be a dubious suggestion . . . ."6/

Faced with the mandate of the D.C. Court of Appeals to justify its earlier decision not to assign the single domestic MSS license it was to award through the comparative hearing process, the Commission backpedaled from its prior determination concerning the non-applicability of lotteries. In announcing its Tentative Decision to affirm its consortium requirement, the Commission stated, in dicta buried within a footnote, that "further reflection" had resulted in the conclusion that a lottery would have been permitted in those circumstances "[u]nder the relevant factors mentioned in the legislative history of the lottery statute . . . ."7/ It did not provide any analysis of

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6/ Aeronautical Radio v. FCC, 928 F.2d 428, 453 (D.C. Cir. 1991).

7/ Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services (Tentative Decision), 6 FCC Rcd 4900, 4905 n.56 (1991) (see subsequent history, footnote 8, infra).

the criteria laid out in the legislative history of Section 309(i) or its own prior cases, nor did it make any attempt to explain why the analysis it performed in its 1987 decision rejecting the availability of lotteries for the domestic MSS service had become invalid in the interim. In subsequently making its tentative judgment final, the Commission provided no additional meaningful explanation. It merely opined, again in dicta, that a lottery "would speed the authorization process" as a possible justification for conducting a lottery to select an MSS licensee.<sup>8/</sup>

The Commission's recent "conclusion" as to the availability of lotteries in MSS application proceedings directly contradicts the finding made by the Commission at the time it initially rejected lottery procedures for MSS, a decision that was then fully justified and supported by the record of the proceeding. The latest action, in addition to having no bearing on the outcome of the case, was completely unsubstantiated --

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<sup>8/</sup> Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services (Final Decision on Remand), 7 FCC Rcd 266, 269 & n.48 (1992), aff'd Aeronautical Radio, Inc. v. FCC, 983 F.2d 275 (D.C. Cir. 1993) (the court affirmed the Commission's refusal to reinstate the application of petitioner Omninet, and declined to review all other aspects of the decision on the ground that no party had standing to seek review).

whereas the 1987 decision was both substantive and substantiated.<sup>2/</sup>

**III. The Commission Does Not Have The Authority To Impose A Lottery To Choose A Licensee From Among The Current Applications For MSS/RDSS Systems.**

In light of the foregoing, the Commission does not have a principled public interest basis upon which it could premise implementation of random selection in the MSS/RDSS proceeding. The Commission itself has expressed contradictory opinions in the domestic MSS proceeding on whether such a step would be authorized or advantageous. Furthermore, on remand, the

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<sup>2/</sup> See MSS Report and Order, 2 FCC Rcd at 487. Although the Commission also correctly observed in its 1987 action that it was not absolutely bound by the criteria contained in the legislative history, it has, nevertheless, consistently relied upon a consideration of the factors listed in the Conference Report to determine whether to use lotteries. See decisions cited in Footnote 2, supra. As explained in Section III, supra, any departure from the analysis undertaken in these decisions must be accompanied by reasoned explanations. In this regard, most or all of the Conference Report criteria have been easily met in each instance where a lottery has been imposed. For example, in the DEMS Lottery Order the Commission did generally cite "additional factors" as reasons that a lottery was warranted. In its discussion, however, the Commission focused solely on the benefits to be derived from the particular lottery procedure it had chosen to use (answering commenters' criticisms of conclusions reached with respect to the Conference Report criteria). The single additional justification cited was the finding that the "lack of significant material differences as a basis for designating applications for comparative consideration severely undermines the potential benefits to be gained by using such [comparative] proceedings." This condition, as well, would not apply to the current processing group of applicants for MSS/RDSS licenses, since the six applicants have vastly different technical proposals.

Commission's weak retreat from its initial finding on the availability of lotteries appears to have been largely for the purpose of attempting to show that the Commission had authority to award licenses through the establishment of a mandatory consortium (i.e., by a means other than through a comparative hearing).

Moreover, in contrast to the domestic MSS proceeding, the current proceeding provides a significant potential for more than one applicant to be granted a license. Since the applicants in the current MSS/RDSS proceeding propose very different modulation techniques, with distinctly different possibilities for multiple entry, the choice of a particular applicant in this processing group will influence the number of licenses ultimately available to members of the current group of applicants, as well as to potential future applicants. In light of the present uncertainty as to the ultimate number of licensees, the Commission has no basis to assert that resolution of this issue by lottery would be in the public interest.<sup>10/</sup>

Finally, adoption of random selection procedures for use in selecting a licensee in the current MSS/RDSS proceeding would entail a dramatic departure from the accepted public interest analysis used by the Commission in prior proceedings. Such a change would have to be fully explained by the Commission to comport with basic administrative requirements. See

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<sup>10/</sup> See footnote 3, supra.



International Union v. NLRB, 459 F.2d 1329, 1341 (D.C. Cir. 1972) ("It is an elementary tenet of administrative law that an agency must either conform to its own precedents or explain its departure from them"). It is difficult to conceive any justification that might be asserted by the Commission to meet such a challenge, and the imposing task is made all the more impossible by the countervailing public and private interests that would be raised by the applicants.

**IV. Public Interest Considerations Militate Against The Use Of A Lottery System To Assign MSS/RDSS Licenses.**

As discussed in detail above, the Conference Report criteria do not support awarding MSS/RDSS licenses by lottery. Even if proceedings generally sharing the characteristics of the MSS/RDSS were appropriate for random selection procedures, however, there are compelling reasons why imposing a system of random selection at this juncture would contravene the public interest.

First, lotteries have never been used to select satellite licenses, even in cases where there was more homogeneity among proposals than is extant among the MSS/RDSS applicants. Here, all applicants have developed technologically distinct proposals, and the proceeding is thus well-suited to resolution by comparative hearing.

Next, lotteries have never been used to select among applicants that would operate on a non-common carrier basis.